Supreme Court, U.S.
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No. 99 - 1571

IN THE
SUPREME COURT OF THE UNITED STATES

TRAFFIX DEVICES, INC.,
Petitioner,

v.

MARKETING DISPLAYS, INC.
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

Amicus brief Supporting Petitioner, TrafFix Devices, Inc.
Requesting Reversal
Permission to file received from both parties.

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Interest of the *Amicus Curiae*

Malla Pollack ("Pollack"), *amicus curiae*, is an associate professor of law. Pollack has no financial interest in the outcome of this litigation.[1] Pollack's sole interest in this case is to encourage the proper protection of the currently endangered public domain. *See, e.g.*, David Lange, *Recognizing the Public Domain*, 44 (no. 4) Law & Contemp. Probs. 147, 176 (1981) (in view of collective action problems, requesting courts to appoint *guardians ad litem* for the public domain in intellectual property cases or, at the least, to welcome *amicus* participation). Both parties have given permission for Pollack to file this *amicus* brief. Copies of the permission letters are attached to the proof of service submitted to the Clerk.

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[1] Malla Pollack is the sole author of this brief. The entire cost of this brief was paid by Malla Pollack personally and with the help of her faculty allowances as a visiting associate professor at Northern Illinois University, College of Law.

Summary of Argument

This Court should reaffirm the constitutional doctrine explicated in *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); the Constitution requires that all matter shielded by a patent must enter the public domain at the end of the patent monopoly. The original, and continuing, meaning of United States Constitution Article One, § 8, cl. 8, the Intellectual Property Clause, requires the "Bargain Theory of Patents." In return for a limited patent grant, the patent holder dedicates all later use of the patented material to the public domain. The donation's scope is practical; the public obtains full use of all commercial benefits formerly shielded by the patent, including any good will in the article as manufactured during the patent term. The public obtains a property right not to be excluded from full commercial exploitation of the activity formerly practiced under the patent; a right which may not be invaded by Congress. This conclusion is embedded in this Court's earlier cases. The conclusion rests on (i) the language of the Constitution, (ii) the Statute of Monopolies, the English antecedent of the Clause, and (iii) the Lockian concept of property accepted by the ratifying generation. The trademark doctrine of functionality is not conterminous with the public's constitutional right not to be excluded.

Argument

I. This Court's Cases Recognize the Constitutional Bargain Dedicating All Material Involved in a Patent to the Public Domain at the Patent's Expiration

The Intellectual Property Clause of the United States Constitution grants Congress the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ...[2]

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[2] U.S. Const. Art. I, sec. 8, cl. 8 ("the Intellectual Property Clause").

The Court has always read this Clause as embodying the Bargain Theory of Patents.

Under the Bargain Theory of Patents, by obtaining a patent grant, the patentee forms an agreement with the public. Once the limited time of the constitutionally allowed grant has expired, the patentee must pay the price — all the power of the patent belongs to the public. *See Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 116 (1938) ("there passed to the public upon expiration of the [utility] patent . . . the right to make the article as it was made during the patent period"); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896) ("It is self-evident that on the expiration of a[n utility] patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property."); *Coats v. Merrick Thread Co.*, 149 U.S. 562, 571 (1893) (same for design patent).

A patent is granted "upon this condition," *Singer*, 163

U.S. at 185, which is constitutional – "limited times," "to promote the progress of science and the useful arts," U.S. Const. Art. I, sec. 8, cl. 8; *see also Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989) ("[T]he ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure.").

The same limitation is imposed on the states both by congressional field preemption, *see id.* at 152 ("Where the public has paid the congressionally mandated price for disclosure, the States may not render the exchange fruitless by offering patent-like protection to the subject matter of the expired patent."), and by the dormant Intellectual Property Clause. *See Goldstein v. California*, 412 U.S. 546, 558 (1973); Malla Pollack, *Unconstitutional Incontestability,* 18 Seattle Univ. L. Rev. 259, 300-326 (1995). *Accord Bonito Boats*, 489 U.S. at 153 ("the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of

allowing free access to copy whatever the federal patent and copyright laws leave in the public domain") (quoting *Compco Corp. v. Day-Bright Lighting, Inc.*, 376 U.S. 234, 237 (1964)).

In the Bargain Theory of Patents, trade dress may not be used to extend a patent because the cost charged for a patent includes any good will inherent in the article itself:

> Kellogg Company is undoubtedly sharing in the goodwill of the article known as "Shredded Wheat'; and thus is sharing in a market which was created by the skill and judgment [and investment of plaintiff.] . . . But that is not unfair. [It] is the exercise of a right possessed by all –and in the free exercise of which the consuming public is deeply interested.

Kellogg, 305 U.S. at 122.

This classic holding meshes with this Court's latest pronouncement on trade dress. Trade dress in unregistered product configurations requires secondary meaning, *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 120 S. Ct. 1339, 1346 (2000). "Secondary meaning" in the appearance of the article is the "good will of the article." This good will of the article *belongs*

to the public at the end of the patent term. The holder of an expired patent may not, therefore, claim an exclusionary right to "secondary meaning" in any aspect of the article formerly marketed under the patent's umbrella. Without secondary meaning, he may not claim a trade dress.

Statutory intent is irrelevant to the Bargain Theory of Patent. Congress is constitutionally limited from writing the Lanham Act, 15 U.S.C. §§ 101 *et. seq.*, to bypass constitutional boundaries. Congress may not use the generalized grant of power in the Commerce Clause, U.S. Const. Art. I, sec. 8, cl. 3, to bypass a limitation in a more targeted power. *See Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982) (Congress may not bypass the "uniformity" requirement in the Bankruptcy Clause by appealing to the Commerce Clause). The Lanham Act itself is not unconstitutional; the circuits have misread the effect of the statute.

The circuits have refused to allow competitors to make

products covered by expired patents without a heavy showing. This burden on access by a member of the public to material purchased by the public (at the price of a monopoly patent) is unconstitutional. The only acceptable price that any member of the public can be charged for duplicating a formerly-patented product is a label reasonably identifying that member of the public as the product's current source. *See Kellogg*, 305 U.S. at 119 (former patentee may only require others to "use reasonable care to inform the public of the source of [their competing] product[s]."). Several circuits want a competitor to demonstrate trademark-type "functionality," i.e. inability to compete economically without an element claimed in an expired patent. *See TrafFix Devices Inc. v. Mktg. Displays, Inc.*, 200 F.3d 929, 939 (6th Cir. 1999) (requiring showing of "competitive necessity"), *cert. granted*, 120 S. Ct. 2715 (2000) (this case); *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1364-65 (Fed. Cir.), *cert. denied* , 120 S. Ct. 527 (1999). But

the trademark doctrine of "functionality" is irrelevant to material which was protected by a patent; the patent bargain is an independent, constitutionally mandated limit on former patent holders' rights to exclude.

This patent bargain is equitable. No one obtains a patent without affirmatively requesting one. A patentee is not required to show commercial value in order to obtain a patent. At any time during the application process, if the applicant dislikes the bargain offered by the Patent and Trademark Office, the applicant can withdraw the pending application. The holder of a patent, therefore, should not be allowed to begin by enjoying a patent and end by claiming (only after consuming the full benefit of the patent term) that the subject matter was not sufficiently valuable to render return performance mandatory. Beside the constitutional dimension, such behavior is inequitable and in conflict with black letter contract principles.

The deposed patent holder, furthermore, retains the

market value of being, by many years, the first to the market. He may still use his brand name on his version of the product. He may still advertise his as the "original" version of the product. He may still publicly claim the most experience with the product. No later competitor shares these advantages.

Kellogg, indeed, correctly goes much further than the language used in *Vornado Air Circulation Sys, Inc. v. Duracraft Corp.*, 58 F.3d 1498, 1510 (10th Cir. 1995) (at expiration of patent term, material enters public domain if it is "part of a claim in a utility patent" or a "significant inventive aspect"). The *Kellogg* Court rested on Perky's utility patent No. 548,086 ('086 Patent) (separately bound Appendix to this *amicus* filing). *Kellogg*, 305 U.S. at 112. The '086 Patent, however, does not claim a pillow shaped food item. '086 at p.2, ll.20-42 ("I claim .... "); Ap. at A2. The descriptive section of Patent '086 asserts that the food product being claimed "can be shaped for baking in various ways." *See* '086 Patent, at p.1, l.98, Ap. at A1. Yet

the pillow shape was held dedicated to the public because this was how the article had been "made during the patent period."[3] *Kellogg*, 305 U.S. at 118. "Functionality," in the trademark sense of affecting cost and quality, was a mere secondary reason for non-protection. *Id.* at 122. A reason, furthermore, on which the Court was handling strongly disputed facts. *Compare* Brief for Petitioner at 57-66, 108-12, *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938)(Nos. 2 & 56) (arguing form is functional) *with* Brief for Respondent at 19-32, 40-41, *Kellogg*, 305 U.S. 111 (arguing form is not functional).

The circuits who have refused to follow *Kellogg* are presumably influenced by modern law and economics theories. The Constitution, however, does not enact modern law and economics anymore than it does Herbert Spencer's formerly

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[3] The pillow shape was covered by an earlier invalidated design patent. The design patent seems irrelevant to the Supreme Court decision. *See Kellogg*, 305 U.S. at 119 n.4.

popular theories. *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Edu. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999) (point of Justice Holmes' dissent in *Lochner* is that majority incorrectly "sought to impose a particular economic philosophy upon the Constitution") (referring to *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

In sum, economic necessity is irrelevant. Every member of the public has the right to use every element of every expired patent and every commercial embodiment ever manufactured under that patent — provided only that the product be clearly labeled as to source. The right is granted by the Constitution. Neither Congress nor the federal courts may deny it.

II. The Intellectual Property Clause Requires the Bargain Theory of Patent Because It Vests in the Public an Inalienable Property Right Not To Be Excluded from the Public Domain

This Bargain Theory of Patent rests on the history and original meaning of the Intellectual Property Clause. We need

to look at the language and historical background of the Clause because the drafting and ratifying process has left us no clearer sources. *See* Malla Pollack, *Purveyance and Power*, Section IV, Writing, Ratifying and Amending the Constitution, forthcoming 30 Southwestern Univ. L. Rev. ___ (2000); currently available at <http://www.fcsl.edu/purveyance.310.2000.htm>.

The Clause involves three different property interests: Authors' Exclusive Rights, Inventors' Exclusive Rights, and the Public Domain which is held in common by the public – not the federal government. The public ownership of the Public Domain is effectuated by the limitations placed on Congress' ability to grant exclusive rights.

This property view of the right not to be excluded from Useful Arts is specified in Madison's 1792 essay on *Property*:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to everyone else the like advantage.
>
> . . . a man's land, or merchandize, or money is

called his property.

> . . . a man has a property in his opinions and the free communication of them.
>
> . . . .
>
> *He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.*
>
> . . . .
>
> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and *monopolies* deny to part of its citizens that free use of their faculties, and free choice of their occupations . . . What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favor his neighbor who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the economical use of buttons of that material in favor of the buttons of other materials! . . .

James Madison, *Property, reprinted in* 1 Founders' Constitution 598-99 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added; original emphasis deleted).

Madison's view of the public's entitlement to market Useful Arts is a Lockian common. Locke saw the central aspect

of property to be the right not to be excluded. To Locke, "property" is anything "that *without a Man's own consent* it *cannot be taken from him*." John Locke, TWO TREATISES OF GOVERNMENT at 2nd Treatise § 193 at 395 (ed. Peter Laslett, student paperback ed. Cambridge Univ. Press 1999 reprint) (emphasis in original). Unlike 20th century lawyers, to Locke the core property right is the right not to be excluded.

A Lockian public domain is an owned public domain. Locke's teleologically original state of nature in which people held all the world in common, *id.* § 26 at 286, is not untouched by human rights. It is a domain in which (a) no individual has a right to exclude others, and (b) each person has a property right not to be excluded. *See* John Tully, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 84-85 (Cambridge Univ. Press 1980). On this point, Locke agreed with a long line of natural law philosophers going back at least to St. Thomas Aquinas, but disagreed with two relative

contemporaries, Grotius and Pufendorf, who saw undivided domains as merely unappropriated. They omitted the Lockian, universally shared, individual right not to be excluded. *See id.* at 68-77, 81-91, 112-16. This difference is crucial in the current controversy.

Madison's property essay quoted above is Lockian in this respect.[4] The default position on commercial activity is that every person has a right not to be excluded from practicing any marketable skill. The Intellectual Property Clause of the Constitution allows Congress to give inventors only a temporary power to exclude others from marketing a useful art. Once the time period of the patent expires, the public's natural right not

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[4] The importance of Locke to understanding the property concepts assumed in the Constitution is widely accepted. *See, e.g.,* C. B. Macpherson, *The Meaning of Property, in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 13 (ed. C. B. Macpherson 1978). Madison's 1792 usage of "property" to include many concepts modernly labeled rights is also Lockian. *See, e.g.,* Tully, *supra,* at 7 ("To speak of Locke's theory of property is to speak of Locke's theory of rights.").

to be excluded returns. The public's right, furthermore, is the practical right to compete in the market – the holder of an expired patent may not block use of any detail of the good as previously marketed under the legal protection of the patent.

The historical basis of the Intellectual Property Clause is The Statute of Monopolies, 21 James 1, c. 3 (1623), *see, e.g.,* Pollack, *Purveyance and Power, supra* (providing detailed discussion of relationships). The Founders' generation met the Statute of Monopolies through 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 159 (1772 reprint by Robert Bell of Philadelphia, *currently available in* 1967 Layton Press reprint). *See e.g.,* Lawrence M. Friedman, A History of American Law 88-79 (1973) (describing importance of 1772 colonial edition of Blackstone). The Statute of Monopolies, as Blackstone reported, limited the King's power to grant patents, thus His power to prevent unfavored persons from practicing useful arts. That Statute, furthermore, was the

beginning of the road to the Glorious Revolution and Locke's King William – it was the first Parliamentary victory against the Royal Prerogative. *See, e.g.,* Charles Howard McIlwain, CONSTITUTIONALISM ANCIENT AND MODERN 138 (1940).

History, therefore, requires a wide definition of the special privileges constrained by the Intellectual Property Clause. The Founders saw themselves as continuing the Whig fight against tyrannical monarchy and related corruption, including "monopolies." *See, e.g.,* Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 623 (1998 paperback ed.); Linda Levy Peck, COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND 220 (1990). "Monopoly" in this heritage is not the technical, economic doctrine involving market power which underlies modern anti-trust statutes and the trademark functionality doctrine. "Monopoly" is a flexible term of disapproval reaching almost any trade practice against the public interest. During the House

of Lord's debate on the Statute of Monopolies, for example, Lord Haughton objected because "Monopolies, what, uncertyne. The punishment is greate." Henry Elsing, NOTES OF THE DEBATES IN THE HOUSE OF LORDS, OFFICIALLY TAKEN BY HENRY ELSING, CLERK OF THE PARLIAMENTS, A.D. 1621, at 104 (ed. Samuel Rawson Gardiner, 1879, Camden Soc'y Pub. No. 103). *See also* Stephen D. White, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-1628, at 118-19 (1979) (flexibility of term "monopoly").

The Lockian tie highlights the constitutional choice to place the public domain property right in the people – as opposed to the government. The quintessential political Locke, TWO TREATISES OF GOVERNMENT, was written in opposition to the monarchial absolutism of Sir Roger Filmer's PATRIARCHIA (1681), and in continuation of the fight over non-parliamentary taxation which culminated in the accession of William of Orange (to whom Locke dedicated the work). *See, e.g.,* John

Dunn, THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE 'TWO TREATISES OF GOVERNMENT' 53 (1995 Cambridge Univ. Press Paperback ed.) (mentioning dedication); *see generally id.* at 43-76 (placing Locke's work in historical perspective and contrasting it to Filmer's claim that the monarch had a preeminent ownership right in all property, thus an unlimited right to tax). England left the power to issue patents of invention in the Crown and developed an unlimited legislature as a check on the monarch. The Constitution, however, vests in the legislature the right to grant Inventors temporary rights to exclude, but carefully limits this legislative power in order to provide an additional protection to the public's right not to be excluded from the "useful Arts."

The Founders' choice of a Lockian, owned public domain as the default status behind the Intellectual Property Clause is an example of their basic political ideology. The

Court has no reason to overrule its correct case law enforcing this original decision.

Conclusion

This Court should reiterate the constitutional teachings of *Kellogg*, 305 U.S. at 116. At the end of every patent grant, all the commercial power of that grant is dedicated to the public, including the unpatented details of the product as marketed. The beneficiary of a patent may not renege on his bargain after accepting the monopoly benefits of that constitutionally cabined agreement. Whether economically efficient or not, this bargain is mandated by the Constitution.

Respectfully submitted: August 16, 2000.

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